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In the
Supreme Court of the United States

October Term, 1970

No. 878

MARY JULIA PARKIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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In The
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NO.

MARY JULIA PARKIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, Mary Julia Parkin, prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of the State of Florida, rendered in these proceedings on July 13, 1970.

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida entered July 13, 1970, discharging the writ of certiorari, affirming the order of the District Court of Appeals, First

District of Florida, is as yet unreported, but appears in Appendix A. The order of the Supreme Court, entered September 21, 1970, denying petitioner's request for rehearing appears in Appendix B. The order of the Supreme Court of Florida, entered September 21, 1970, staying further proceedings until October 21, 1970, appears in Appendix C.

The opinion and order of the District Court of Appeal, First District of Florida, entered May 6, 1969, affirming the Circuit Court of Duval County, Florida, is reported in 222 So.2d 457 and appears in Appendix D.

JURISDICTION

The opinion of the Supreme Court of Florida was rendered on July 13, 1970. Petition for rehearing was filed within the proper time and denied on September 21, 1970. The Supreme Court of Florida on September 21, 1970, granted petitioner a stay of proceedings until October 21, 1970, to enable her to seek review in this Court.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257(3) providing for review by writ of certiorari of a state court judgment where a right, privilege, or immunity is claimed under the Constitution of the United States.

Petitioner candidly admits that although the opinion of the Supreme Court of Florida concludes the lower court's judicial labors on the issue involved in this petition, there is not that degree of "finality" which the United States Supreme Court has held should exist before jurisdiction of the United States Supreme Court should attach. While petitioner does not concede that there is no possibility that the judgment herein sought to be reviewed is "final" because "No self-enforcing formula defining when a judgment is 'final'

can be devised", *Republic Natural Gas vs. State of Oklahoma*, (1948) 68 S.Ct. 972, 334 U.S. 62, 92 L.ed. 1212, the situation here may be one where this court will regard the judgment as final, even though it disposes of only an interlocutory question. More important however, is the fact that irreparable injury will occur to the petitioner if the Florida judgment is allowed to stand. This is illustrated more specifically later in this petition, but the substance of the irreparable injury is that petitioner, in a case where the death penalty is a clear and present danger to her, is compelled to waive her constitutional right against self-incrimination or forfeit her insanity defense at her murder trial. If she is required to wait until the completion of her murder trial before being able to invoke federal jurisdiction she will do so upon peril of receiving the death penalty if she does not waive her right against self-incrimination. It is difficult to imagine a situation where there would be more "irreparable injury". Jurisdiction therefore is invoked on the "irreparable injury" theory. See, *Clark vs. Willard*, 55 S.Ct. 385, 294 U.S. 211, 79 L.ed 865, 98 A.L.R. 347; *Cumbel vs. Pitkin*, 5 S.Ct. 616, 113 U.S. 545, 28 L.ed 1128. This compelled "waiver" is certainly a critical point in the proceedings against petitioner. Under the orders of the State Court, she will be forced to give verbal answers to questions propounded to her by skilled interrogators, in the presence of the prosecutor, such questions touching upon events occurring before and after the alleged crime, the questions and answers to be used against her at the trial. By the terms of said opinion and judgment, if she fails to respond to the questioning of the psychiatrists, she will be deprived of her inherent right to make her insanity defense. These answers, once given cannot be erased. More important at this time, however, is that she is being forced to give information in the presence of the prosecutor which can be used by said prosecutor as

leads in his search for other information, contrary to the "fruits of the poisonous tree" doctrine.

IMPORTANCE AND NATIONAL SCOPE OF QUESTION

It is reported [State vs. Olsen, 143 N.W.2d 69 (Minn. 1966)] that thirty states have statutes requiring defendants in criminal cases to submit to a pre-trial psychiatric interrogation similar to the one involved in this petition. In addition, the federal courts recognize such a right without a statute or court rule authorizing it. Twelve jurisdictions, including Florida, have ruled upon the question reaching divergent and opposite conclusions for a myriad of different reasons resulting in general confusion. *People vs. Ditson*, (Cal. 1962) 369 P.2d 714, 732; *French vs. District Court of Denver*, (Col. 1963) 384 P.2d 269; *People vs. English*, (Ill. 1964) 201 N.E.2d 455; *State vs. Olsen*, (Minn. 1966) 143 N.W.2d 69; *People vs. Fazio*, (1954) 132 N.Y.S. 2d 107; *New Jersey vs. Whitlow*, (N.J. 1965) 210 A.2d 763; *People vs. Higgins*, (1960) 198 N.Y.S. 2d 1019; *Shepard vs. Bowe*, 442 P.2d 238 (Oregon, 1968); *State vs. Raskin*, (Wis. 1967) 150 N.W.2d 318; *Pope vs. United States*, 372 F.2d 710 (8th C.A.); *United States vs. Albright*, 388 F.2d 719 (4th C.A.); and *United States vs. Baird*, 414 F.2d 700 (2nd C.A.)

Evidence of the vitality of the issue is seen from the recent treatises on the subject: *Death Knell for Pre-Trial Mental Examination? Privilege Against Self-Incrimination*, Danforth 19 Rutgers Law Review 489; *Compulsory Mental Examination and the Privilege Against Self-Incrimination* by Nuernberg, 1964 Wis. Law Review, Vol. 1965, Page 671; and, *Pre-Trial Mental Examination and Commitment, Some Procedural Problems in the District of Columbia* by Eberharter, O'Toole and Parks, 51 Georgetown Law Journal, 143, 151.

QUESTIONS PRESENTED

QUESTION ONE

WHERE INSANITY WILL BE A DEFENSE AT A CRIMINAL TRIAL, IS A DEFENDANT'S RIGHT AGAINST SELF-INCRIMINATION VIOLATED BY COMPELLING THE DEFENDANT TO GIVE PRE-TRIAL TESTIMONIAL RESPONSES TO PSYCHIATRISTS APPOINTED BY THE COURT UPON THE REQUEST OF THE PROSECUTION?

QUESTION TWO

DOES THE ACTION OF THE STATE COURTS OF FLORIDA IN ORDERING A DEFENDANT IN A CAPITAL CASE TO GIVE TESTIMONIAL RESPONSES TO COURT APPOINTED PSYCHIATRISTS OR LOSE A RIGHT TO PRESENT HER INSANITY DEFENSE VIOLATE A DEFENDANT'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES?

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment V: (As incorporated in the Fourteenth Amendment of the Constitution of the United States.)

> "No person shall *** be compelled in any criminal case to be a witness against himself, nor be deprived of

life, liberty, or property without due process of law ***"

Constitution of the United States, Amendment XIV, Section 1:

"* * * nor shall any state deprive any person of life, liberty, or property without due process of law * * *."

STATEMENT OF FACTS

The defendant, Mary Julia Parkin, was indicted by the Duval County Grand Jury for the offense of murder in the first degree as a result of the death of her husband, Wilfrid Byron Parkin, Jr.

Florida has a court rule, Rule 1.210(b) Florida Criminal Procedure Rules [formerly 909.17, 917.02 Florida Statutes] which requires a defendant in a criminal case to give advance notice that he will rely upon a defense of insanity and sets forth the procedure following such notice. The rule requires the filing of a description of the type of insanity which will be relied upon and a list of the witnesses by whom the defendant expects to prove such insanity. The procedure also requires the appointment by the court of psychiatrists to examine the defendant pre-trial "in the presence of attorneys for the State and for the defendant, if they choose to be prsent".

The defendant, through her counsel, gave timely notice to the court that she would rely upon the defense of insanity at the time of the commission of the alleged offense as one of her defenses (R-43). The court, thereafter, ordered the defendant to file a bill of particulars (R-44) showing the nature of the insanity she expected to rely upon and the

name or names of the witnesses by whom she expected to show such insanity. The defendant filed her bill of particulars in compliance with said order (R-45). The court then entered an order appointing two psychiatrists to examine the defendant as to her sanity or insanity at the time of the commission of the alleged offense (R-50). In this order it was provided, in accordance with the appropriate statute and rule, that the State Attorney and the attorney for the defendant had the right to be present at said examination, or examinations.

Pursuant to said order, the defendant presented herself at the offices of one of the court-appointed psychiatrists for the purpose of being examined by the psychiatrist. Her attorney was present. At that time the defendant stated her name and address, and permitted the psychiatrist to make a physical and neurological examination (R-53, 56), but as to each and every other question regarding her mental status, past and present, her medical history, her version of the homicide, or any further information, upon advice of counsel, she invoked her privilege against self-incrimination and refused to answer the questions asked by the court-appointed psychiatrist. A motion (R-53) was then filed by the State seeking the entry of an order directing the defendant to submit to a psychiatric examination by the court-appointed psychiatrist and directing her to cooperate with him to that extent deemed necessary by him for the formulation of an opinion as to her sanity or insanity. The defendant filed written objection (R-57) to the motion primarily on the ground that the entry of such an order would violate her rights against self-incrimination as guaranteed by both the Florida and the United States Constitutions.

On March 13, 1968, the trial court entered an order directing the defendant to submit to a full psychiatric examination

by the court-appointed psychiatrists and to co-operate in such examination to the extent deemed necessary by the psychiatrists for the formulation of an opinion by them as to the sanity or insanity of the defendant at the time of the commission of the offense charged and subsequent thereto. *The order further provided that at the trial any psychiatric testimony offered by the defendant which is based upon any history, statements or information as to the crime, or otherwise, furnished to her privately retained psychiatrist during his interview with, or examination of her, would be excluded, unless and until she cooperated as provided for in the order.*

It was that order of March 13, 1968, which defendant sought to quash by writ of certiorari to the Circuit Court of Duval County, filed in the District Court of Appeal, First District. The District Court of Appeal, First District, rendered the decision attached hereto which provides that a defendant who gives advance notice of an intention to rely upon a defense of insanity at the time of the offense has a constitutional right (self-incrimination) not to give testimonial responses to court-appointed [pursuant to Section 909.17, Florida Statutes, now Rule 1.210(b) Florida Criminal Procedural Rules] psychiatrists; but, *if the defendant does not waive that right she "will not be heard either in person or by private, and therefore presumably biased experts," as to her sanity.* The court also held that where a defendant relies upon a defense of insanity, the burden of proving that defense is upon the defendant.

Thus, the District Court of Appeal imposed an even more drastic penalty on the petitioner if she failed to answer the questions of the psychiatrists, by actually depriving her of her right to present her insanity defense.

On June 4, 1969, the First District Court of Appeal denied petitioner's request for rehearing, but did determine and cer-

tify to the Supreme Court of Florida that its decision was one which passed upon a question of great public interest as contemplated by Section 4(2), Article V of the Constitution of Florida.

The Supreme Court of Florida granted certiorari to the First District Court of Appeal.

On July 13, 1970, the Supreme Court rendered its opinion and judgment discharging the writ of certiorari, and affirming the lower courts, but again stated that "*the defendant's right at trial to offer evidence on the issue of her sanity at the time of the alleged crime is conditioned upon her cooperation during a psychiatric examination on behalf of the prosecution or court.*" (emphasis supplied)

Petition for rehearing was denied on September 21, 1970, but on the same date, the Supreme Court of Florida granted a stay of further proceedings to enable petitioner to seek review in the Supreme Court of the United States and to obtain any further stay from that Court.

ARGUMENT

These questions were first presented in petitioner's objections (R-57) to the State's motion for the entry of the first order of the Circuit Court of Duval County, Florida, (R-70), requiring the petitioner to answer the questions of the psychiatrists and in the subsequent petitions for certiorari and the briefs supporting these petitions.

As far as petitioner has been able to discover there has not been an opinion of the Supreme Court of the United States passing directly upon this question. There have been several State decisions passing upon the question directly and many

decisions passing generally on the question of a defendant's right against self-incrimination under similar circumstances.

Petitioner emphasizes that she is not questioning the validity of the Florida Statute, or Court Rule providing for the examination of a defendant in a criminal case to determine such defendant's mental condition, at the time of the alleged offense and at the time of trial. (Sections 909.17, 917.02 Florida Statutes.) These or similar statutes have generally been held to be constitutional per se.

The statutory requirement that a defendant in a criminal case give advance notice that he will rely upon a defense of insanity is not of recent vintage. Most of these statutes require the defendant to submit to a pre-trial psychiatric examination. When they were first enacted the statutes themselves were immediately attacked as unconstitutional, as violative of the Fifth Amendment right against self-incrimination. One of the first states to deal with the problem agreed that the statute was unconstitutional, *People* vs. *Dickerson*, 129 N.E. 199 (Mich.). This interpretation was not recognized by other courts, however, and in all instances when such a statute has been attacked since that time its legality has been preserved. See, 32 A.L.R. 2d 434. But, the courts had to strain in order to avoid the self-incrimination assault and in order to uphold the constitutionality of these statutes, engaged in some philosophical gymnastics which have now come back to haunt these courts. Professor Wigmore and some courts had held that the self-incrimination proscription applied only to testimonial compulsion. A recent extension of this doctrine was applied by the United States Supreme Court in *Schmerber* vs. *United States*, 351 U.S. 141, 80 S.Ct. 215, 4 L.ed 2d 205. According to this theory an accused person can be required to stand in a line up, exhibit features, submit to fingerprinting, put on certain types of clothing,

and almost anything not requiring the accused to communicate verbally. The courts seized upon this distinction in upholding the constitutionality of the mental examination statutes. In each instance when the constitutionality of the statute was assailed, the court held that the statute itself was not unconstitutional because the defendant could waive the constitutional right by submitting to the psychiatric examination. In almost each opinion where the court holds the statute to be constitutional there is a suggestion that the saving factor is that the defendant is not compelled to give testimony or responses to the court appointed psychiatrist. Now however that the defendants in the various states and in the federal courts are accepting the suggestion by refusing to submit to pre-trial psychiatric interrogation, some of the same courts are holding that the defendant has no such right to refuse.

It seems necessary to point out, therefore, that although the question of self-incrimination in mental examinations has generally arisen in cases challenging the constitutionality of the compulsory examination statutes, the most significant question is not whether an examination can be ordered but where, once it is ordered, the defendant can be compelled to cooperate with the examining phychiatrist.

As mentioned above most of the State Courts, in the same opinions upholding the constitutionality of such laws per se, are careful to point out that the defendant has the right to "refuse to cooperate".

> "But we do not interpret the order of the court to direct the examination of the defendant against his will or over his protest. It does not order him to submit to an examination."
>
> *Hunt vs. State*, (1946) 248 Ala. 217, 27 So.2d 186

> "To assert his constitutional rights, all that is required is for him to stand mute."
>
> *State vs. Grayson*, 239 N.C. 453, 80 S.E. 2d 387

Similar expressions are found in *People vs. Strong*, 114 Cal. App. 522, 300 Pac. 84, 32 A.L.R. 2d 445, Annotated; *Jessner vs. State*, 202 Misc. (Wis.) 184, 231 N.W. 634; *State vs. Myers*, 200 So.Car. 309, 67 S.E.2d 506; *State vs. Genna*, (1967) 163 La. 701, 112 So. 655; *Commonwealth vs. Distasio*, 294 Mass. 273, 1 N.E. 2d 189; *Noelke vs. State*, 214 Ind. 427, 15 N.W.2d 950; *People vs. Combs*, 14 Cal.Rep. 4, 363 Pac.2d 4.

There have been a few courts which, facing the question on appeal from convictions after the defendant's statements to the doctors had been introduced in evidence, evade the question by saying that the statements would have to be considered voluntary, i.e., that the defendants had waived objections to their introduction. However, this Court has long discounted such waivers.

> "Such waivers are not now to be lightly inferred." Emspak vs. United States, 349 U.S. 190, 75 S.Ct. 687 99 L.ed. 997."

This question has been decided directly in a few cases. The case most often cited in this connection is *French vs. District Court*, supra. In entering prohibition against the lower court to prohibit it from forcing the defendant to answer the questions of the psychiatrist, as in this case, the Court said:

> "A person accused of a crime who enters a plea of not guilty by reason of insanity cannot be compelled to carry on conversations against his will under the penalty of forfeiture of the defense for failure to respond to questions, or for a refusal to cooperate with persons

> appointed to examine him. The statute which prescribed the procedures to be followed upon the entry of a plea of Not Guilty by reason of insanity cannot operate to destroy the constitutional safeguards against self-incrimination."

Supporting this view are the later cases of *State vs. Olsen*, supra; *State ex rel. LaFolette vs. Raskin*, 150 N.W. 2d 318 (Wis. 1967); *Shepard vs. Bowe*, supra.

Varied types of sanctions to force defendants to cooperate with court-appointed psychiatrists have been attempted and held invalid.

For instance, in an opinion by the New Jersey Court in the case of *State vs. Whitlow*, supra, the Court said that allowing the prosecutor to comment on defendant's refusal to consent would probably violate his constitutional right against self-incrimination, in view of the holding of *Griffin vs. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.ed 2d 106 and *Malloy vs. Hogan*, 378 U.S. 1, 84 S.Ct. 148 12 L.ed 2d 653.

In the opinion and judgment of the Supreme Court of Florida in this case, statements so obtained (by compelling defendant's answers to questions from the psychiatrist), "are used as evidence of mental condition only, and not as evidence of the factual truth which may be contained in them". The inability of a jury to make such a distinction, even under instructions from the Court has been recognized by this Court in *Krulevich vs. United States*, (1949) 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.ed. 780 and in *Bruton vs. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.ed. 2d 476.

The Courts of the State of Florida have conceded that the petitioner has the right (against self-incrimination) to re-

main silent, but nevertheless impose such penalties upon her invocation of her right against self-incrimination as to nullify it. Such conditions have been declared by this Court to be mere coercive devices.

> "We said in Malloy vs. Hogan: 'The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement--the right of a person to remain silent unless he chooses to speak in unfettered exercise of his own will and to suffer no penalty *** for such silence.'" 378 U.S. 8, 84 S.Ct. at 1493, 12 L.Ed. 2d at 659.
>
> "In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in Griffin vs. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.ed. 2d 106, the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly'. * * * ". Spevack vs. Klein, (1967) 385 U.S. 511, 87 S.Ct. 625, 17 L.ed. 2d 574.

See also *Simmons vs. United States*, (1968) 390 U.S. 377, 88 S.Ct. 967, 19 L.ed. 2d 1247, 1248; *Garrity vs. New Jersey*, (1967) 385 U.S. 493, 87 S.Ct. 616, 17 L.ed. 2d 562.

The decisions in the State Courts of Florida, each court imposing a more drastic penalty or condition upon the petitioner, deprived her of her right to present her insanity defense entirely in violation of her rights to due process under the Constitution of the United States.

> "To go a step further than Leland and Fisher and deny a defendant the right to introduce evidence probative of legal sanity, would seem clearly to violate due process. If due process so protects a defendant, then his right to contest *mens rea* with medical evidence ought

not to be conditioned upon a waiver of the privilege against self-incrimination."

Death Knell for Pre-Trial Mental Examination? Privilege Against Self-Incrimination by Danforth, Vol. 19, Rutgers Law Review, Pages 489, 502.

Even statutes enacted seeking to take away from a defendant the right to raise the insanity defense have been declared invalid; [see *Sinclair vs. State*, (Miss.) 132 So. 591; *State vs. Strasburg*, (Wash.) 110 P. 1020; *State vs. Lange*, (La.) 123 So. 625; 21 Am.Jur.2d 116, Note 20; Annotation in 74 A.L.R. 265. See, also discussion on this point in *State ex rel. Juhan vs. District Court of Jefferson County* (Col. 1968) 439 P.2d 741.].

CONCLUSION

It is respectfully submitted that compelling a defendant in a capital case against her will to communicate orally with a psychiatrist appointed by the court violates her constitutional rights against self-incrimination as guaranteed by Amendments V. and XIV. of the Constitution of the United States and the sanctions imposed upon such defendant resulting in her being deprived of her right to make an insanity defense violates her right to due process as guaranteed by Amendments XIV, Section 1 of the Constitution of the United States, and that petitioner is in real danger of suffering irreparable injury if she is compelled to comply with the order of the State Court.

Respectfully submitted,

DATZ & JACOBSON

By .....
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I DO CERTIFY that a copy hereof was furnished to the Office of the Attorney General, Tallahassee, Florida, by mail, this ..... day of October, 1970.

APPENDIX

APPENDIX "A"

OPINION OF FLORIDA SUPREME COURT
Filed July 13, 1970

ADKINS, J.

This case arose in the Circuit Court of Duval County, where petitioner Mary Julia Parkin is charged with first degree murder. The District Court of Appeal, First District, certified the question in this case to be of great public interest, affirming the decision of the trial judge. *Parkin v. State*, 222 So.2d 457 (Fla.App.1st, 1969). We granted petitioner's petition for writ of certiorari. F.A.R. 4.5(c)(6).

Defendant Parkin was indicted for first degree murder in her husband's death. She served notice to rely on the defense of insanity at the time of the alleged offense. F.Cr.P.R. 1.210(b). The trial court appointed two psychiatrists to examine defendant as to her sanity or insanity at the time of the incidents giving rise to the indictment, and provided that the State Attorney and the defendant's attorney both should have the right to be present during examination. F.Cr.P.R. 1.210; *Fla. Stat.* § 909.17.

At the hearing before the court-appointed experts, the defendant, relying on advice of counsel, refused to answer questions regarding her mental status or medical history. She invoked the constitutional privilege against self-incrimination. *Fla. Const.*, art. I, § 9 (1968); *Fla. Const., Declaration of Rights*, § 12 (1885).

The State moved the trial court to compel defendant's cooperation with the psychiatrists, in order that they might formulate opinions as to defendant's mental capacity. The trial court ordered defendant to cooperate with a full psy-

chiatric examination, stating that her own evidence of insanity would be excluded during trial unless she cooperated with the court's expert's. Defendant by petition for writ of certiorari secured review by the District Court of Appeal, First District, which affirmed the trial court, holding in essence that the issue of insanity is separate from the issue of guilt, and the defendant by tendering the issue of insanity invited inquiry into her mental condition.

The District Court then certified, as a question of great public interest, the following question to this Court:

> Where a defendant in a criminal case serves notice that she will rely upon a defense of insanity and the Court over her objections, orders her to give testimonial responses to court appointed psychiatrists under pain of forfeiting the testimony of her privately engaged psychiatrist, are the defendant's rights to freedom from self incrimination invaded?

The core question of self-incrimination in hearings to determine mental capacity was answered by this Court long ago. In *Blocker v. State*, 92 Fla. 578, 110 So. 547 (1926), this Court after careful study held without dissent that such an examination does not violate the privilege against self-incrimination. We adopted the view of the State of Nevada, *State v. Petty*, 32 Nev. 384, 108 Pac. 934, Ann.Cas.1912D, 223, where examination under procedures similar to those presently held in Florida were found not to violate constitutional rights.

A related question was presented to us *McVeigh v. State*, 73 So.2d 694 (Fla. 1954), when constitutional challenge was made to *Fla. Stat.* § 917.02, which provides that experts appointed by the Court to examine a defendant's mental capacity

> "[S]hall be summoned to testify at the trial and shall be examined by the court and may be examined by counsel for the state and the defendant." (p. 697)

This Court reviewed authority from other jurisdictions and concluded without dissent that the procedures established in Florida contain no violation of fundamental right against compulsory self-incrimination. Compare *McCullers v. State*, 143 So.2d 909 (Fla.App.1st, 1962) in which the Court held that where opinions are offered in testimony based on discussions by a psychiatrist with third parties, the testimony is vulnerable to objections on the ground of hearsay. This has the effect of limiting expert's examination to interviews of the accused, or in-court listening to testimony offered by third persons. Also compare *Land v. State*, 156 So.2d 8 (Fla. 1963), in which this Court upheld testimony where the psychiatrist had talked with third parties, but confined his testimony primarily to opinions formed on basis of discussions with and examination of the defendant.

Authorities of other jurisdiction are in accord with the past decision of this Court. In *State v. Myers*, 220 S.C. 309, 67 S.E.2d 506, 32 A.L.R.2d 430 (1951), a defendant prosecuted for murder was committed to a state hospital for determination of his mental condition. This procedure was authorized by statute but defendant contended that the action of the Court compelled him to be a witness against himself. In rejecting this contention, the Court said:

> "While there are a few early cases to the contrary, it is now almost uniformly held that where insanity is interposed as a defense, the compulsory examination of an accused by experts for the purpose of determining his mental condition and testifying in regard thereto does not violate either the constitutional privilege of

the accused of not being compelled to be a witness against himself or the constitutional guaranty of due process of law. Hunt v. State, 248 Ala 217, 27 So2d 186; People v. Strong, 114 Cal App 522, 300 P 84; Ingles v. People, 92 Colo 518, 22 P2d 1109; Blocker v. State, 92 Fla 878, 110 So 547; Noeelke v. State, 214 Ind 427, 15 NE2d 950; State v. Genna, 163 La 701, 112 So 655; Commonwealth v. Millen, 289 Mass 441, 194 NE 463; People v. Truck, 170 N 203, 63 NE 281; State v. Nelson, 162 Or 430, 92 P2d 182; Commonwealth v. Musto, 348 Pa 300, 35 A2d 307; Jessner v. State, 202 Wis 184, 231 NW 634, 71 ALR 1005; State v. Coleman, 96 W Va 544, 123 SE 580. Also, see Rule 205, Model Code of Evidence, American Law Institute." (p. 432)

An annotation on this subject is contained in 32 A.L.R.2d 437. On pages 444-445, the author of the annotation says:

"One of the principal objections advanced against statutes providing for examination of the defendant by experts appointed by the court or designated by statute has been that such an examination results in the accused being obliged to give evidence against himself, as the result of his participation in the examination.

"In the following cases, attacks on the constitutionality of statutes based on the theory of self-incrimination have been rejected."

In support of this statement, authorities are cited from Alabama, Arkansas, California, Colorado, Indiana, Louisiana, Massachusetts, South Carolina and Wisconsin.

The constitutional privilege against self-incrimination in history and principle seems to relate to protecting the accused

from the process of extracting from his own lips against his will an admission of guilt. In the better-reasoned cases it does not extend to the exclusion of evidence of his body or of his mental condition as evidence when such evidence is relevant and material, even when such evidence is obtained by compulsion. *State v. Grayson*, 239 N.C. 453, 80 S.E.2d 387, 310 (1954). See also *State v. Coleman*, 96 W.Va. 544, 123 S.E. 580 (1924); *State v. Riggle*, 76 Wyo. 1, 298 P.2d 349 (1956); *State v. Spears*, 76 Wyo. 82, 300 P.2d 551 (1956).

There is a differentiation of the issue of insanity from that of guilt-in-fact. The insanity plea and the guilty plea raise separate issue on which different kinds of evidence may be introduced. As a general rule, if evidence is admissible on one issue and inadmissible on another, the Court may allow the evidence to come in. However, the trial judge does possess discretion in excluding evidence admissible on one issue if its probative value on that issue is insufficient to outweigh its prejudicial effect on other issues. *McCormick, Evidence*, § 59 (1954); *Adkin v. Brett*, 184 Cal. 252, 193 Pac. 251 (1920). The Court should prohibit the psychiatrist from testifying directly as to the facts surrounding the crime, where such facts have been elicited from the defendant during the course of a compulsory mental examination.

In other words, the Court and the State should not in their inquiry go beyond eliciting the opinion of the expert as to sanity or insanity, and should not inquire as to information concerning the alleged offense provided by a defendant during his interview; however, if the defendant's counsel opens the inquiry to collateral issues, admissions or guilt, the State's redirect examination properly could inquire within the scope opened by the defense.

This procedure makes available to the psychiatrist such in-

formation as he needs to form an opinion as to the ability of the defendant to tell right from wrong, without at the same time opening all information given during such psychiatric examination for use during trial unless it is opened by the defendant. This procedure also places the burden of proving guilt on the prosecution, without opportunity to require a defendant pleading insanity to incriminate himself as to guilt in attempting to establish insanity.

Historically, the protection against self-incrimination is designed to protect against extraction of confessions or evidence by thumbscrews, rack and third degree. The privilege never has required that any Court be deaf to any words a defendant may choose to speak, simply because they may be incriminating. The Constitution does not shield against incrimination by voluntary statements, even if given in pursuit of a collateral issue such as insanity; it does, however, shield against the unfair use of such statements.

A defendant pleading insanity may in the end prove himself guilty while trying to prove himself insane; this is a risk he must take. However, he may not be compelled to prove himself either. Self-incrimination is not directly an issue in cases such as this, simply because the question to be resolved is not guilt or innocence, but the presence or absence of mental illness. Illness, particularly mental illness, although often capable of being proved by extrinsic evidence, is considered more susceptible to proof by evidence based on interviews with the defendant and requiring his cooperation. For this reason, a court before whom an insanity plea is entered is empowered to appoint experts to examine the defendant, and to arrange for examination by these experts. This procedure becomes extremely important in those cases where lay testimony as to the issue of insanity might be unavailable.

It must be borne in mind that an examination into mental capacity must be confined to that issue only. Although it is not a hunting license, a defendant must be required to fully cooperate as to this issue; further, if he makes admissions which are incriminating and he is found not to be insane, such admissions are admissible in testimony to the extent (and only to the extent) that the matters therein are opened during examination by counsel for the defendant. The actuality of illness, having been put in issue by the defendant, must be fully resolved for the protection of the defendant and of society.

Experts appointed by the Court to ascertain mental capacity are neither prosecution nor defense witnesses, but neutral experts working for the Court, and their findings and opinions are subject to testing for truth and reliability by both prosecution and defense counsel. Defense counsel in this case would alter the balance, so as to permit the defendant to prove his case by defense expert testimony, while denying the prosecution access to the defendant to attempt to prove the prosecution's case. It is a cornerstone of a workable system of criminal law that every person is presumed sane, and capable of controlling their actions and being held responsible for these actions. *M'Naghten's Case*, 10 Clark & F. 200, 8 English Reprint 718 (1843); *Hodge v. State*, 26 Fla. 11, 7 So. 583 (1890). Obviously, this is only a presumption, and may be overcome. When the presumption of sanity is rebutted, then the State must prove sanity beyond every reasonable doubt, just as it must other elements of the offense. *Hodge v. State, supra.*

Defense counsel argues that it is unconstitutional compulsory self-incrimination in this case, since the trial judge stated that defendant's evidence of insanity would not be permitted lacking defendant's cooperation with experts ap-

pointed by the Court. This precise question has not been previously raised in Florida. However, the defendant having raised the issue of possible insanity, as distinguished from guilt or innocence, must be expected to help resolve it with greatest accuracy. Like the decision to testify in one's behalf and risk incrimination during cross-examination, the decision to plead insanity and tender proof is not a pathway without stones.

In its order, the Circuit Court stated that if the defendant did not cooperate, she would not be allowed to present testimony of previately-employed experts. The District Court, in affirming, stated that she not only would not be allowed to present such evidence but would be barred from testifying in person as to her alleged insanity.

The English or common-law rule of insanity as a defense, contained in *M'Naghten's Case, supra*, proceeds upon the theory that if a man knows the nature or quality of his act and that it is wrong, he has sufficient mental capacity to be responsible for not properly controlling his action. By *Fla. Stat.*, § 775.01 F.S.A., the common law of England in relation to crimes, except as to the modes and degrees of punishment, is of full force where there is no existing provision by statute on the subject. The *M'Naghten* rule has been recognized and adopted by the Florida court. *Davis v. State*, 44 Fla. 32, 32 So. 822 (1902). See 6 F.L.P., *Criminal Law*, § 30.

In the absence of statute the issue of insanity at the time of the alleged commission of an offense could be tried under a plea of not guilty. A formal plea that a defendant was insane was not necessary. *Johnson v. State*, 57 Fla. 18, 49 So. 40 (1909).

The Criminal Procedure Act of 1939 included *Fla. Stat.*

§ 909.17 F.S.A., setting out the procedure for interposing a plea of not guilty by reason of insanity whereby the defendant is required to give notice of such defense at arraignment or prior thereto. The Criminal Procedure Act of 1939 also included *Fla. Stat.* § 917.02 F.S.A., authorizing the court to appoint experts to examine the defendant. These statutes are included in the Criminal Procedure Rules as Rule 1.210(b) and (c), Cr.P.R.

The defense of insanity is authorized by the statute adopting the common law and when defendant exercises this right by such a plea he submits himself to the examination prescribed by statute and thereby permits the results of such examination to be presented to the court.

The defense of insanity, like self-defense, theoretically at least, applies only to persons against whom each of the elements of the offense charged could be established. Like self-defense, the defense of insanity, if successfully pleaded, results in an acquittal. Unlike the acquittal of self-defense which means liberty, the acquittal of the insanity defense may mean deprivation of liberty for an indefinite term in a mental institution. Thus the insanity defense is not an absolute defense, but merely a device for triggering possible indeterminate restraint.

When the plea of not guilty by reason of insanity is entered, the defendant must raise a reasonable doubt as to whether he had a sufficient degree of reason to know that he was doing a wrongful act. *Brock v. State*, 69 So.2d 344 (Fla. 1954).

When the plea of not guilty by reason of insanity was entered, it was done so with knowledge of the existing statutes and case law on the subject. There is no constitutional right to plead this defense, and, if the statutes and case law permit

a defendant the privilege of raising it, he must waive certain constitutional rights with respect to it, including the privilege against self-incrimination. The defendant's right at trial to offer evidence on the issue of his sanity at the time of the alleged crime is conditioned upon his cooperation during a psychiatric examination on behalf of the prosecution or court.

Psychiatric examinations are greatly dependent upon testimonial utterances of the person examined. However, any statements obtained from the patient by the doctor are used as evidence of mental condition only, and not as evidence of the factual truth which may be contained in them.

In answer to the question certified to us by the District Court, we hold that, where a defendant in a criminal case serves notice that she will rely upon a defense of insanity and the court over her objections orders her to give testimonial response to court-appointed psychiatrists under pain of forfeiting the testimony of her privately-engaged psychiatrist, the defendant's rights to freedom from self-incrimination are not invaded.

We approve the opinion of the First District Court of Appeal and the writ of certiorari is

Discharged.

ROBERTS, CARLTON and BOYD,J.J., concur

ERVIN,C.J., concurs specially

ERVIN, C.J., concurring specially:

Compliance with the trial court's order directing that the defendant cooperate fully with court-appointed psychiatrists in their endeavor to conduct a mental examination of the defendant does not necessarily mean the defendant uncon-

stitutionally incriminates herself in disgorging or revealing testimonial-type information pursuant to the authorized inquiry. Although the mental examination order in this case is not confined to an inquiry of information of a nontestimonial nature [compare Schmerber v. California, 1966, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (blood test); United States v. Wade, 1967, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 and Gilbert v. California, 1967, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (lineup identification); and Howard v. State, 1969, 230 So.2d 1 (voice test)] and although in my opinion compulsion sufficient to invoke the privilege exists here by virtue of the provision in the order requiring Petitioner to cooperate in the examination at the price of forfeiture of the right to pursue evidentiary proof of her insanity defense (see Spevack v. Klein, 1967, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574; Garrity v. New Jersey, 1967, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562; also Simkins v. Simkins, Fla.App. 1969, 219 So.2d 724, cert. dismissed 225 So.2d 916), in the final analysis it is the manner in which such compelled disclosures are subsequently utilized that determines the application of the protection afforded by the privilege against self-incrimination. It is the attempted use of the information compelled from the defendant which should function as the fulcrum to measure the scope of the protection afforded by the privilege. So long as the testimonial revelations of the defendant are used solely as the vehicular means by which the psychiatric expert fashions his opinion on the issue of defendant's sanity, there occurs no harmful incriminatory abuse of the information gleaned from the defendant.

Absent interjection of the insanity issue, the prosecution is not in any way handicapped in its effort to prove the element of mens rea necessary to sustain most criminal offenses. In most instances, mens rea can be proved inferen-

tially from the conduct of the defendant. Even in bizarre instances the prosecution can always invoke the aid of the presumption in favor of sanity. However, when the issue of insanity as defined under the M'Naghten rule is raised by a defendant and a reasonable doubt as to the defendant's sanity generated, the prosecution is put to the test, so to speak, in any endeavor to prove sanity and thus mens rea. The presumption of sanity vanishes and the normal inferences of mens rea derivative from the conduct of the defendant are obliterated. The prosecution is forced to meet the issue of insanity head on – meaning it must produce expert opinion evidence on this issue comparable to that available to the defendant. Any competent expert opinion as to the sanity or insanity must of course utilize in some respect testimonial responses from the subject. This is simply a characteristic of the analysis of this particular science so far as it is presently understood and advanced. Legal theories, including the workings of organic principles, do not function in a vacuum unattended by realities. Thus, under the exigencies above described, it is not difficult to find sufficient justification and constitutional latitude for the mental examination procedure authorized and sought to be invoked in the present case. But the potential feature of the instant procedure in terms of compromising the privilege against self-incrimination must be carefully limited in order to check untoward results.

The majority opinion laudably recognizes limitations on the use of the testimonial information compelled from a defendant in a mental examination when it states:

> ". . . The Court could prohibit the psychiatrist from testifying directly as to the facts surrounding the crime, where such facts have been elicited from the defendant during the course of a compulsory mental examination.

"In other words, the Court and the State should not in their inquiry go beyond eliciting the opinion of the expert as to sanity or insanity, and should not inquire as to information concerning the alleged offense provided by a defendant during his interview; however, *if the defendant's counsel opens the inquiry to collateral issues, admissions or guilt,* the State's redirect examination properly could inquire within the scope opened by the defense.

"This procedure makes available to the psychiatrist such information as he needs to form an opinion as to the ability of the defendant to tell right from wrong, without at the same time opening all information given during such psychiatric examination for use during trial unless it is opened by the defendant. This procedure also places the burden of proving guilt on the prosecution, without opportunity to require a defendant pleading insanity to incriminate himself as to guilt in attempting to establish insanity." (Emphasis supplied.)

I agree with the above-quoted portion of the majority opinion with the following reservations: Such a rule limiting the use of the testimonial revelations of a defendant should be held to spring directly from the protection afforded by the privilege against self-incrimination and not from vague, uncircumscribed and unidentified collateral sources that are not spelled out with some specificity. As thus oriented, contrary to the majority's suggestion, testimonial revelations of the defendant, as opposed to the psychiatric opinion predicated thereon, could not be introduced into evidence even where defendant's counsel opened inquiry into collateral issues. Only in those instances where a defendant takes the stand and waives the privilege himself should the door then be opened for the admission of those testimonial utterances secured from

the defendant through the court-ordered examination. Furthermore, by recognizing the constitutional impact of the mental examination procedure here involved, procedures and rules presently exist which properly could be utilized to proscribe and challenge a prosecutor's use of the mental inquiry to lead to tainted or "fruit of the tree" evidence; a situation which is not countenanced in the underlying rationale suggested by the majority for the limitations here imposed.

APPENDIX "B"

FLORIDA SUPREME COURT
ORDER ON PETITION FOR REHEARING

On consideration of the Petition for Rehearing filed by Attorneys for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

APPENDIX "C"

FLORIDA SUPREME COURT
ORDER ON MOTION TO STAY

Petitioner's motion to stay mandate is hereby granted and proceedings in the District Court of Appeal, First District, and in the Circuit Court, Fourth Judicial Circuit in and for Duval County are hereby stayed to and including October 21, 1970 to enable petitioner to seek review in the Supreme Court of the United States and obtain any further stay from that court.

APPENDIX "D"

OPINION OF FLORIDA FIRST DISTRICT COURT OF APPEAL

MAY 6, 1969

(REHEARING DENIED JUNE 4, 1969)

222 So.2d 457

JOHNSON, Judge.

This is a petition for writ of certiorari to the circuit court of Duval County, Florida, seeking to have reviewed an order of the circuit court directing the defendant, petitioner here, to cooperate in the examination into her sanity by the court appointed psychiatrists, and providing that unless she did so cooperate that any testimony offered by her privately employed psychiatrist would be excluded.

This petition is alleged to have been presented under and pursuant to Article 5, Section 4, of Florida Constitution, F.S.A., and Rule 4.5, subd. c, F.A.R., 32 F.S.A. Because of great public interest in the question raised in this petition, and the peculiar facts of this case, we accept jurisdiction in this matter and will express our views on the question as raised.

The defendant was indicted for first degree murder for shooting her husband. Pursuant to Section 909.17 Florida Statutes, F.S.A., the defendant gave advance notice that one of her defenses would be insanity. Thereafter, as provided by the Florida Statute, the court appointed two psychiatrists to examine said defendant and to report their findings and conclusions as to her sanity. The defendant was ordered to submit to such examination by the two court appointed psy-

chiatrists. The defendant together with her attorney went to the office of one of the court appointed psychiatrists, gave her name and address and submitted to a physical and neurological examination, but refused, upon advice of her counsel, to answer any questions regarding her mental status, past and present, her medical history or any further information, on the ground of self-incrimination.

The State filed a motion asking the court to direct the defendant to submit to a psychiatric examination and directing her to cooperate with the court appointed psychiatrists to the extent he deemed necessary for formulation of an opinion as to her sanity or insanity. The court granted such motion and directed that if the defendant did not submit to examination and cooperate with the court appointed psychiatrist, that any psychiatric testimony offered by the defendant at her trial furnished by her privately retained psychiatrist would be excluded.

It is this order which the petitioner wants quashed.

The question boils down to whether the court can require a defendant in a criminal proceeding, who has served notice on the state that a plea of insanity will be relied upon as a defense, to submit to examination by medical experts, without violating said defendant's constitutional rights against forced self-incrimination?

This question was presented to the Florida Supreme Court in the case of State v. Cason, 194 So.2d 257 (1967), but the court declined to answer because its answer would not "facilitate the final disposition of the cause." The Florida Supreme Court however, in McVeigh v. State (Fla. 1954) 73 So.2d 694, held Section 909.17, Florida Statutes, F.S.A., constitutional.

There are some 23 states which have statutes with respect

to insanity pleas in criminal cases. Of these, only 14 provide for compulsory mental examinations whereas the others deal with present insanity only, or else have no provision for enforcing psychiatric examinations.[1]

In some states, where there is a statute similar to Florida's the courts have held generally that the defendant could not refuse to submit to physical or neurological examinations but that such defendant did not have to answer questions pertaining to medical history or anything verbal that had a bearing upon her emotional or mental temperament, or anything that related to the act of which the defendant was accused. Some states have held the statute as being unconstitutional per se[2] but Florida Statute constitutional[3] as pointed out supra.

In McVeigh, the court said, with respect to the question of whether that part of F.S. Section 917.02, F.S.A. relating to the appointment of experts to examine the defendant, their examination by the court and counsel was violative of the Bill of Rights and the Fifth and Fourteenth Amendments to the Federal Constitution, or not:

> "* * * It is sufficient answer to this question to say that the burden was on the state to prove the defendant's guilt. The fact that the court is permitted to examine the witness, if he exercises the privilege, does not transgress the provision of the Constitution. * * * In this case the issue of insanity was raised and the burden was on defendant to prove it. No substantive right of defendant is shown to have been violated."

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1. 51 Georgetown Law Journal, 143, 145.
2. People v. Dickerson, 164 Mich. 148, 129 N.W. 199, 33 L.R.A., N.S., 917.
3. McVeigh v. State, 73 So.2d 694 (Fla. 1954)

This was the same answer given by the court as to the question as to the power of the court to require the defendant to submit to examination by medical experts appointed under F.S. Section 917.02, F.S.A. and then questioning them by the court as to sanity of the defendant.

The last sentence of F.S. Section 917.02, F.S.A. reading as follows:

> "* * * The experts appointed by the court shall be summoned to testify at the trial and shall be examined by the court and may be examined by counsel for the state and the defendant."

seems to be the gist of the grievance. Were it not for this last sentence, then, of course, the experts appointed by the court could testify as to the conclusions reached as to the sanity or insanity, only, without going into detail as to how such conclusions were reached. But because of this sentence, if it is to be construed literally, the question is present as to the defendant having been forced to testify against himself.

The briefs of the respective counsel for the petitioner and the respondent provide a rather comprehensive resume of the laws of this and other jurisdictions, on the admissibility of the experts' testimony and the constitutionality of the statutes similar to Florida's Section 909.17, F.S.A. and F.S. Section 917.02, F.S.A.

But, I do not believe any of the Florida District Courts of Appeal nor the Supreme Court, have answered the question with which we are confronted here. In the other Florida cases, the question of admissibility of the evidence, after the court appointed psychiatrists had conversed with and examined the accused, was acted upon.

In 1954, the Supreme Court of Florida in McVeigh v. State, cited supra, held that the issue of insanity having been raised by the defendant, it was up to the defendant to prove it and the fact that the court is permitted to examine the witness, does not transgress the provision of the Constitution.

In 1963, the Supreme Court of Florida held in Land v. State[4] as follows:

> "The psychiatric phase of medicine, relatively new, involves tenuous delving in the nebulous processes of mentality. The conclusions are seldom positive and unquestionable and, weighed by the jury's impression of the expert's capability and professional integrity, are to be evaluated in the light of all attendant qualifying factors. Such an opinion touching the intangible state of the subject's mind must as of course be based upon such sources of information as are available, including the subject himself, his background, his behavior and the related facts and circumstances."

The court said further, however that an opinion founded upon the expert's scientific examination of the subject and conversations with third persons would not be inadmissible absent a showing that his conclusion was based in major or substantial part upon conversations. Indirectly, again the court has sanctioned the examination of the accused by the experts and admitted the evidence so obtained as not being violative of the constitutional rights of the accused.

In McCullers v. State[5] the District Court of Appeal, First District of Florida, held that the opinion of the expert based in substantial part on conversations between the expert and

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4. Land v. State, 156 So.2d 8 (Fla. 1963).

5. McCullers v. State, 143 So.2d 909 (Fla. App.1st, 1962).

third persons purporting to know the facts concerning the conduct of the defendant prior to and immediately subsequent to the homicide, was inadmissible as being based upon hearsay evidence.

A very strong case, which is cited frequently, is People v. Strong[6] from California. The court in that case points out, inter alia, that the appointment of the experts, the psychiatrists is in aid of truth, which the court is seeking in order to determine the controversy with justice to all. The court further held, however, that there was no merit to the contention that the defendant is compelled to be a witness against himself.

That the statute does not force the defendant to say anything. He can remain mute. Therefore there is no compulsion.

[1, 2] We think this is the proper interpretation of our Florida Statute also. The defendant cannot be forced to say anything to the experts, but by the same token, in order that the court may be dealt with honestly and fairly so as to mete out justice, if the defendant elects to keep quiet in the presence of the court appointed, and therefore unbiased expert witnesses, then the defendant will not be heard either in person or by private and therefore presumably biased experts, as to the sanity of the defendant. The burden of proof is on the defendant to sustain the plea of insanity, and justice and fairness to the court and society demands that the state be afforded the same source of information, namely, confrontation of the defendant in conversational examination, by the court appointed experts which will not necessarily be in rebuttal to but may be in confirmation of the private expert's opinion as to the sanity of the defendant.

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6. People v. Strong, 114 Cal.App. 522, 300 P. 84.

[3] In order that the stricter safeguard against self-incrimination as to the overt act of the crime, may be retained, we feel that if the defendant elects to defend on the ground of insanity, the basis for such determination as the defendant wishes to put before the court and jury, should also be available to the court's appointed expert witnesses, but such experts shall be required to limit their testimony to matters of conduct of the defendant at or near the time of the alleged offense not having a direct bearing upon the overt act itself. Of course, the experts should refrain from any expression as to the innocence or guilt of the party accused.

In Jessner v. State[7] the Supreme Court of Wisconsin dealt upon the statute and the admissibility of the evidence in a case similar to that at bar. In Wisconsin, the statute which provides for the appointment of the experts to determine the status of sanity, carries a provision that no testimony regarding the mental condition of the accused shall be received from witnesses summonsed by the accused until the expert witnesses summonsed by the prosecution have been given an opportunity to examine and observe the accused. While we do not have such a statutory provision in Florida, the order of the trial court under attack here, carriers almost that identical prohibition and while not controlling, such conclusion does appear to us in accord with logic and reason.

[4] It is to be remembered that the psychiatrists appointed by the court are not appointed for the purpose of helping to obtain a conviction, but are for the purpose of preventing a miscarriage of justice. These experts are appointed for and interested in only one question: the sanity or insanity of the accused at the time of commission of the crime. This can only logically be determined after examination of the ac-

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7. Jessner v. State, 202 Wis. 184, 231 N.W. 634, 71 A.L.R. 1005 (1930).

cused. The experts are precluded from supplying any link in the chain of evidence to establish the conclusion that he committed the act of which he is accused. In fact, when the issue of insanity is tendered, it invites an inquiry into the mental condition of the accused at the time of the commission of the act. His mental responsibility becomes a separate and distinct issue from that of guilt or innocence.

[5] In view of what appears to us to be the prevailing philosophy of the courts of this state and our sister states, we are compelled to the opinion that while the accused defendant cannot be compelled to converse with or otherwise cooperate with the court's experts, neither can such defendant grant the privilege of such examination to her private expert and deny it to the court appointed experts and still present such testimony to the court and jury.

Therefore, the petition for certiorari is hereby denied and the order of the trial court affirmed.

WIGGINTON, C. J., and SPECTOR, J., concur.

FILED
FEB 22 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

NO. 878

OCTOBER TERM, 1970

MARY JULIA PARKIN,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT L. SHEVIN
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

Counsel for the Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 878

OCTOBER TERM, 1970

MARY JULIA PARRIN,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Unlike petitioner, it is respondent's view that the only opinion or judgment with which this Court may properly concern itself is that of the Supreme Court of the State of Florida entered on July 13, 1970, as reflected in petitioner's Appendix A - 238 So.2d 817.

There is very little, if any, point in considering what the District Court of Appeal may have said since that opinion has been supplanted or replaced by that of the Florida Supreme Court.

Be the above as it may, it should become readily apparent by the end of this response that whatever view one may take

of which opinion is involved, it very much should follow that no federal questions of any magnitude are involved and the petition for review should be denied.

JURISDICTION

While petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. 1257 (3), she has utterly failed to demonstrate that any right, privilege or immunity which she might claim is her due under the Constitution of the United States either exists or is in such a stage as would jurisdictionally permit this Court to review the matter as a judgment which is "final".

Petitioner candidly admits that there may be a substantial question as to whether the matter on which she seeks this Court's review is "final". Indeed she acknowledges that except under a possible theory that she will suffer irreparable injury if this review is not granted and the ruling be one which finds in her favor. Clark v. Williard, 55 S.Ct. 365, 294 U.S. 211, 79 L.ed. 865, 98 A.L.R. 347; Gumbel v. Pitkin, 5 S.Ct. 616, 113 U.S. 545, 28 L.ed. 1128.

Obviously, respondent takes issue with any suggestion of irreparable injury occasioned by the State of Florida. If injury results to petitioner, it will be

as a result of her own doing and nothing which Florida imposed against her.

Added to the historical sequence by means of which she now seeks this Court's review, is the fact that on or about the 6th of November, 1970, she filed a motion for stay of proceedings in the trial court until her petition for writ of certiorari was acted on by this Court. Shortly thereafter she drafted and filed an amended motion for stay on or about the 10th of November, 1970. On or about the 18th of November, 1970, respondent filed its opposition to motion for stay with this Court.

On November 25, 1970, the office of the clerk of this Court advised counsel for petitioner that Mr. Justice Black denied the application for stay with the following endorsement:

> "Application for stay denied.
> Nov. 25, 1970 S/ Hugo L. Black".

Respondent is unaware of any further action taken in the Circuit Court in and for the Fourth Judicial Circuit of Florida with regard to petitioner's trial.

Indeed, the very fact that this Court inquired as to whether the State of Florida would oppose the granting of a further stay so as to temporarily preclude trial (provisionally set for sometime in January, 1971), indicates that unless the State of Florida was able to demonstrate some reason in addition to the lack of finality that certainly at least the stay would be granted if not review by certiorari. That being so, we stood on the proposition that the decision below was simply not one which ought to have caused this Court to skirt its own oft recited position that it would not grant review by certiorari of non-final judgments. Indeed, no judgment has ever been entered in this case. Beyond the simple possibility of arraignment, it may fairly be said that petitioner has never yet set foot in court as a result of the charge against her, and has, at all times, enjoyed bonded liberty and does as of this date.

Accordingly, it will become patently obvious that since she had opened the door to the matters which may be developed at trial, it is ridiculous (legally and logically) to suggest that the responsibility therefor be assessed against the State of Florida to the extent that she be permitted to go to trial (assuming she will even agree to this) without having to answer the questions of the state's psychiatrists appointed to examine her.

IMPORTANCE AND NATIONAL SCOPE OF QUESTION

We are told by petitioner that this is a vital view because writers have seen fit to discourse thereon. Respondent wonders at whether the vitality of an issue should ever turn on the simple fact that some persons may elect to write (albeit well) on the subject.

If we were discussing the circumstances involved in all those cases cited by petitioner in her brief which hold in her alleged favor or indeed the case of New Jersey v. Whitlow (N.J. 1965), 210 A.2d 763, we might agree that there would be some importance involved to the question. Unfortunately for petitioner the circumstances in which she finds herself have no counterpart in any of the cases on which she ostensibly relies on the merits. Indeed, not even New Jersey v. Whitlow, supra, has within its purview the circumstances extant here. This is true even if we do not take into account the undeniable lack of "finality" of judgment which should be critical even before any of the matters may be reached.

QUESTIONS PRESENTED

Respondent accepts petitioner's questions presented as they appear in her brief at page five, assuming one can put aside the jurisdictional and legal deficiencies with which she comes to this Court seeking review.

CONSTITUTIONAL PROVISION INVOLVED

Obviously the Fifth Amendment to the Constitution of the United States as incorporated by the Fourteenth Amendment to the United States Constitution is the basis of her complaint here--once again assuming we are able to reach the matter for proper disposition in light of her argument.

STATEMENT OF THE FACTS

The statement of the facts set out by petitioner in her brief at pages six through nine is reasonably accurate and tracks those events which occurred and gave rise to the matter presently at issue.

We add, however, that this Court, by and through the person of Mr. Justice Black denied her several motions for a stay of proceedings in the lower court after a response filed by the State of Florida.

ARGUMENT

We consider it noteworthy that petitioner has not elected to rely on simple numerical authority but instead has put forth an extremely well documented effort on what she conceives the better rule to be. We will, of course, not have the benefit of such an effort since being in such a numerically inferior status literally requires a compelling argument on what we consider the merits to be.

The following observations are made in response to petitioner's position:

Because of the unchallenged course of events which gave rise to the issue here being considered, the state finds itself in this predicament: if the petitioner introduces any testimony of insanity, the burden then falls on the state to establish the sanity of the petitioner beyond a reasonable doubt, and if the state fail to present sufficient testimony to overcome that burden, the petitioner is entitled to an acquittal. See Purcell v. State, Fla., 101 So.2d 130. Furthermore, there is an obligation on the court to determine whether or not petitioner is in such a state of idiocy, imbecility, or lunacy as to make it incumbent on such court to see that she is not put on trial. See People v. Pembaur, 15 N.Y.S.2d 215. A duty has also been judicially placed upon the prosecution to insure that the proper pretrial medical examination is secured whenever it has reason to believe that the accused's state of mind will be an issue at trial (51 Geo. L. J., p. 148, citing Winn v. U.S., 270 F.2d 326). Since the petitioner refuses to cooperate with the psychiatrist, refuses to answer any questions propounded by him or to take any tests requiring responses from her, such as are usually given by psychiatrists in order to determine mental capacity, the prosecution has no way to meet its

burden, and the objective above stated is frustrated by a blanket application of the privilege against self-incrimination.

Since oral examination and conversation are almost essential for an expert to form a sound opinion of a person's mental condition, it is obviously difficult to make a complete psychiatric examination of a defendant who refuses to talk. Weihofen on Mental Disorder as a Criminal Defense, page 296.

> "It is obvious, even to the layman, that in all probability a psychiatrist would require more than a mere physical examination of a defendant in order to reach a conclusion of his sanity or insanity. The very nature of the psychiatric study would seem to call for utterances or answers through conversation with the alleged incompetent. The psychiatric interview is the basic diagnostic tool." (Emphasis supplied)
>
> See Krash, "The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia", 70 Yale L. J. 905, 918.

To further emphasize the plight of the prosecution in a situation like this one, attention should be called to two (2) recent Florida decisions and a 1965 Florida statutory enactment. In the case of McCullers v. State, 143 So.2d 909,

the Court held that admission of testimony by state's expert as to defendant's sanity at time of alleged crime was error, where testimony was based in substantial part upon extrajudicial and undisclosed statements made to expert by third persons concerning defendant's actions shortly prior to and immediately following the event. It is true that in the later case of Land v. State, Fla., 156 So.2d 8, the Supreme Court held that "an opinion founded upon the expert's scientific examination of the subject and conversations with third persons, would not be inadmissible, absent a showing that his conclusion was based in major or substantial part upon such conversations". Nevertheless, in the same case, the court held that the extent to which the psychiatrist relied on information obtained through other than first hand observation is an element to be considered by the jury as it assesses the credibility of the psychiatrist's report. Section 90.242, Florida Statutes, places a further handicap upon the examination of a defendant by creating a privilege between a patient and psychiatrist to refuse to disclose communications between patient and psychiatrist although making an exception in cases in which the patient introduces his mental condition as an element of his claim or defense.

Thus, the state is put in this position. Under McCullers, supra, and Land, supra, he cannot rely upon a history given to him by third persons. Hence, he is handicapped in learning the circumstances surrounding defendant's actions

at the time of the crime, knowledge which all psychiatrists deem essential, particularly when the court psychiatrist seldom seeks to examine a defendant until long after the crime was committed. He is handicapped in learning whether the crime was one of passion, or of long premeditation, how the defendant acted immediately before, during and after the commission of the crime, what he said, whether his continuing actions such as plans to escape and avoid detection indicated a cool calculation or irrational recklessness.

In spite of this handicap, sometimes a psychiatrist can make a diagnosis as to mental condition, based on conversations with a defendant, not merely depending upon defendant's relation of the history of the case, but by the very way in which he answers questions, his demeanor, his reactions to various long accepted tests. Now, under the present situation, if she is to be allowed to refuse to talk to the psychiatrist or to refuse to cooperate with him, then the prosecution will be placed in an intolerable situation. If the petitioner can, by a blanket application of the privilege against self-incrimination so frustrate an examination, and the state will be faced with the burden of proof, then the state can look forward only to mass acquittals or reversals. Small wonder that respectable psychiatrists throw up their hands and decline to accept appointments under such conditions.

It is probable that the state will not even be permitted to prove the refusal of the petitioner to cooperate with the psychiatrist at the trial. There appears to be a great deal of difference of opinion on this question depending to a great extent on the statutes in various states. A great deal will depend upon the answer to the main question, ie. whether or not the petitioner can be required to answer in the first place. See 87 ALR 2d 375, note 6. Some states by statute permit comment on defendant's refusal to take the stand but this procedure has been held violative of the Fifth Amendment.

After an extensive search of the authorities, there appear but two or three cases that deal with the question of whether or not a defendant can be compelled to cooperate with the examining psychiatrist. In negative fashion, many courts have indicated that an accused can refuse to cooperate.

> "At this point, it seems necessary to point out that although the question of self-incrimination in mental examinations has generally arisen in cases challenging the constitutionality of the compulsory examination statutes, the more significant question is not whether such an examination can be ordered but whether, once it is ordered, the defendant can be compelled to cooperate with the examining psychiatrist." (Emphasis supplied)

Pre-trial mental Examination Commitment. Some Procedural Problems in the District of Columbia, Vol. 51 Georgetown L. J., p. 143, 152.

Many states have enacted statutes requiring the mental examination of defendants in criminal cases, and there have been many decisions throughout the country upholding the constitutionality of such statutes when they were attacked on the theory of self-incrimination (See annotation in Vol. 32 ALR 2d, p. 445). Although these decisions have almost unanimously upheld the constitutionality of such statutes and included fine sounding statements about the necessity of such statutes, almost invariably these decisions have also included some statement to the effect that the statutes did not require testimonial compulsion. Following are some excerpts illustrating the statement above that courts which, while upholding the constitutionality of the statute, at the same time expressed themselves against testimonial compulsion.

"Examination as Compelling Self-Incrimination.
The constitutional privilege against self-incrimination does not protect a defendant against being required to submit to psychiatric examination to determine his mental condition. While there are some cases to the contrary, the sound rule is that the privilege extends only to testimonial compulsion--to

extracting from the witness' own lips an admission of guilt. It does not exclude his body as evidence when it may be material."

Wiehofen on Mental Disorder as a Criminal Defense, page 293, 294.

"The statutory provision that board appointed by superior court shall examine an alleged sexual psychopath or person accused of specified sex offenses to ascertain whether he is a sexual psychopath is constitutional, and order issued thereunder granting petition for examination of a person charged with enticing a female child was valid, such person being entitled to refuse to answer questions which he thought might incriminate him, as against contention that examination had effect of ordering defendant to testify before examining board with reference to matters which might be incriminating. Laws 1949, c. 314, Section 4."

In re Miller, 95 Atl.2d 116 (N.H.).

"In rejecting an attack on a statute requiring the court to appoint alienists to examine a defendant pleading insanity, the court in People v. Strong (1931), 114 Cal.App. 522, 300 P. 84, pointed out that the law did not require the defendant to submit to an examination, that he could

> stand mute when the experts sought to examine him, and that if he did submit to the examination it was entirely voluntary."
>
> 32 A. L. R. 2d 445 (Anno.).
>
> "In the examination, appellant will not be required to vouch for anything. * * * Nothing will depend on his testimonial responsibility * * *. We do not undertake now to define the limits of such rights except to say that the authorities of that institution will not be permitted, over the protest of accused, to reveal any confession made by him in the course of such examination or declarations implicating him in the crime charged."
>
> State v. Myers, 200 So. Car. 309, 67 S.E.2d 506, 32 A. L. R. 2d 430 (anno.).

Other cases making similar statements are: State v. Grayson, 239 N. C. 453, 80 S. E. 2d 387 (cites many cases upholding statute but again says "no evidence of compulsion"); Hunt v. State, 248 Ala. 217, 27 So.2d 186 (Holds statute good because defendant not forced to submit.); Wymer v. People, 114 Colo. 43, 160 Pac.2d 987; People v. Strong, 114 Cal.App. 522, 300 Pac. 84 (Statute does not require him to submit); State v. Genna, 163 La. 701, 112 So. 635 (this defendant not forced to give evidence

against himself--only to be looked and spoken to); Comm. v. DStazio, 294 Mass. 273, 1 N.E.2d 189; Comm. v. Millen, 289 Mass. 441, 194 N.E. 463; Jessner v. State, 202 Wisc. 184, 231 N.W. 634 (only examination consistent with the constitutional rights of accused); McVeigh v. State, Fla., 73 So.2d 694 (passes on constitutionality but does not mention anything about testimonial compulsion); U.S. ex rel. Daverse, 198 Fed.2d 934 (good discussion of right of state to examine defendant); People v. Spencer, 60 Cal.2d 64, 383 Pac.2d 134; People v. Esposito, 287 N.Y. 389, 39 N.E. 2d 925, 142 A.L.R. 956; State v. Livingston, 233 S.Ct. 400, 105 S. E.2d 73; Early v. Tinsley, 286 Fed.2d 1, also Early v. People, 352 Pac.2d 112, 118; State v. Eastwood, 73 Vermont 205, 50 Atl. 1077; Rogers v. State, 222 Mass. 690, 76 So.2d 831; State v. Riggle (Wyo.), 298 Pac.2d 349; Comm. v. Butler, 405 Pac. 36, 173 Atl.2d 488 (not compelled to answer).

Thus, we see that the very decisions which uphold the constitutionality of the statutes indirectly disapprove of testimonial compulsion or forcing the defendant to answer questions.

The only two cases directly dealing with this point have been reported recently. One, the recent case of French v. District Court Division Nine,

152 Colo. 384, 384 Pac.2d 268, wherein the Supreme Court of Colorado directly refused to force a defendant to cooperate with psychiatrists and the other, the case of State v. Whitlow, 45 N. J. 3, 210 Atl.2d 763, which directly holds that the defendant may be required to cooperate.

In the case of French, supra, the defendant pleaded "not guilty by reason of insanity" and thereafter refused to cooperate with examining psychiatrists. The examiners notified the trial court that a determination of sanity or insanity could not be reached as the defendant "again would not furnish the examiner with any information about himself". The trial court, upon the motion of the District Attorney, ordered the plea of not guilty by reason of insanity stricken and ordered the case to be tried on the merits of the plea of not guilty. The defendant sought relief by prohibition or, in the alternative, mandamus. A rule to show cause was issued and the question before the appellate court was raised as follows:

> "Can a defendant who enters a plea of not guilty by reason of insanity at the time of the alleged commission of the crime, but who thereafter willfully refuses to cooperate and permit an examination of himself by physicians as prescribed by law, when said defendant is capable of cooperating in said examination, nevertheless maintain that plea and have a jury determination thereof?"

The appellate court answered this question in the affirmative and made the rule (prohibition) absolute, saying:

> "A person accused of a crime who enters a plea of not guilty by reason of insanity, cannot be compelled to carry on conversations against his will under the penalty of forfeiture of the defense for failure to respond to questions, or for a refusal to cooperate with persons appointed to examine him. The statute which prescribes the procedures to be followed upon the entry of a plea of not guilty by reason of insanity cannot operate to destroy the constitutional safeguards against self-incrimination."
>
> French v. District Court, Division Nine, supra.

Much extensive argument could be made beyond that already advanced but all of which would assume that petitioner finds herself in a position comparable to any of those in existence in the cases allegedly holding in her favor. In short, she cannot, by simply raising the "bogeyman" of alleged self-incrimination, hope to earn a review to which she is simply not entitled.

There has been raised here, of course, the allegedly ominous threat of self-incrimination--which indeed may have prompted this Court to inquire of

respondent as it has.

The Court may be assured that this fear exists only in the imagination of Mary Julia Parkin, the petitioner, and it has no existence whatever in reality. Whatever may have been the particulars surrounding the events leading up to the murder with which she is charged, she has undoubtedly made them known to her own psychiatrist (presumed to be one Dr. Ernest Miller). It is a certainty that she has declined to be that charitable with Dr. Hugh Ingram, the state's appointed psychiatrist. In any case, she no longer enjoys the right to clasp her secret only to her bosom and that of her counsel--if indeed she ever told him.

Said another way, there is no longer a question of self-incrimination or any privileged matter being extracted from her--by her act she has already established that as a claim impossible for her to make.

Are we seeking truth or do we hope for surprise? We submit that surprise can be the only purpose for the course of conduct followed by petitioner. As of January 1, 1968, the new rules of criminal procedure became law in Florida. Mary Julia Parkin has not yet been tried on the charge of murder in the first degree. When she is, both sides will have available to them all those things which the new rules provide shall be theirs. The office of the state attorney, under its authority to subpoena individuals whom it believes have evidence which would be

of interest to the state in criminal matters, undoubtedly will use that authority. In so doing, it is assumed that said office will seek statements from John R. Compton, Nancy Parkin, Christopher Parkin, Rebecca Parkin, Ramsey N. Shepherd, Jr., Mrs. Cressee French, James L. Mathas, Mrs. Iris Mount and Dr. Ernest Miller (witnesses ostensibly available for trial).

Assuming that Dr. Ernest Miller is the psychiatrist on whom she intends to rely, he, too, will be interrogated about everything he knows about the case. There is absolutely no basis upon which he or indeed any other witness (save and except the defendant) may decline to appear and give a statement or answer inquiries.

The Court's attention is invited to the specific provisions of Section 90.242 (3) (b), Florida Statutes, reading as follows:

> "(3) There shall be no privilege for any relevant communications under this section:
>
> * * *
>
> "(b) In a criminal or civil proceeding in which the patient introduces his mental condition as an element of his claim or defense, or, after the patient's death, when said condition is introduced by any party claiming or defending through or as a beneficiary of the patient."

Certainly this will be a criminal proceeding. Just as certainly as Mrs. Parkin introduced her mental condition as an element of defense, there can be no doubt but that Dr. Miller could be compelled to discuss every vestige of communication and information regarding those events which transpired during the course of his examination of Mrs. Parkin.

We ask, if it could be done in that fashion, what difference does it make that it is done in another fashion? She elected this as her defense and told the particulars of her activities to this doctor. It is not privileged information and must be divulged on demand by proper authority.

If harm, whether potential or otherwise, is the touchstone of petitioner's argument, then respondent respectfully submits that the harm is identical in every particular. This leaves as the only feature for which she can opt--the element of surprise. Obviously, she would be delighted to have the state attorney find out for the first time at trial just what, if anything, she said of the particulars of the crime. What should the trial judge then do? Perhaps declare a mistrial and later afford the state an opportunity to pose these facts to their psychiatrist thereby allowing him to take them into account when he conducts his physical and neurological examination of this woman? We would certainly hope not.

There is simply no way in which, under the existing law in this state, and in particular that of Section 90.242 (3) (b), supra, that petitioner can escape the truth and justice within. She is assured she will be tried. By electing to bare her soul to her chosen psychiatrist and seal her lips to the state's psychiatrist, whatever she tells her doctor has to become known to the prosecution before trial, whether as we contend it can be done or as she contends it ought not to be done.

That being the case, and surely it is, one must put aside the ominous spectre of forced self-incrimination. It is no longer the bogeyman that petitioner has sought to make it. In short, it is only resident in her imagination--not because it is not to her real but rather because it is just as real the other way.

The privilege against self-incrimination is one with which, of course, no court should deal lightly least of all this one. It must be remembered, however, that once an individual accused of a crime breaks his silence to someone other than his lawyer or spouse, he has made himself vulnerable to having those events about which he spoke used against him.

Of course, it might be said that if she did not put the particulars of her activities before her own psychiatrist, how in the name of good sense could she ever expect to put that matter before the trier of fact as a defense to the charge? We understand that she wants her doctor to know all of the particulars so that he can, in his good judgment, move the jury to find her not guilty because in his professional judgment, she did not know the difference between right and wrong when she killed her husband. We also understand that she does not have cast upon her shoulders the burden of equipping the state with the same amount of information so as to permit them to have their psychiatrist find that she was not so insane as to not know the difference between right and wrong.

Left her way, she would have the best of both worlds going in. The rub comes, however, when she must face the fact that when she told her psychiatrist of just what she did, the privilege against self-incrimination as to those utterances simply exists no more. A Hobson's choice? Perhaps so but one which she was free to make counseled as she was by a man of her own choosing.

Let us assume for the moment that the psychiatrist to whom she went and who heard all of the gory details found that she was indeed not insane and so advised her, may it fairly be said that if the State of Florida learned of this highly unusual turn of events, they could not

subpoena him to testify at her trial regarding her sanity? None but fools would suggest that this individual could not be so subpoenaed and be compelled to testify.

Adverting to our argument ante, it must be remembered that Section 90.242 (3) (b), supra, does not seal the lips of a psychiatrist in these circumstances. Indeed, if it does anything, it specifically excepts psychiatrists so situated.

There ought to be no reason whatever (judicial or otherwise) why this woman should be permitted to place before her own psychiatrist all of the factual particulars surrounding the murder that does not also exist as a compelling reason to do the same for the psychiatrist appointed by the court.

Who among us can deny that in virtually all instances, one's mental state is a matter for the subjective determination of an examining psychiatrist rather than the objective results of physical tests or neurological examinations? Is it possible that her psychiatrist is not gifted enough to be able to do this examination without the benefit of her description of her activities at the time in question and the state's doctors are? Indeed, the letter executed by Dr. Ingram and sent to Judge Durden clearly indicates and flatly states that it is impossible for him to

reach any conclusion without the co-operation of the petitioner in relating the factual circumstances giving rise to the matter in issue. That is simply an honest pronouncement of a man trying to carry out his assignment. He is not Merlin who, by simply waving his magic wand, can divine sanity without an utterance by petitioner. Obviously, Dr. Miller, who probably examined her for the defense, was himself not a Merlin but rather just an ordinary psychiatrist who had to have tools with which to work.

Terminally, we observe that the entire issue is simply mooted by the fact that everything she told her psychiatrist so as to enable him to make an intelligent assessment of her sanity (as to which she need only raise a doubt), is and always was available to the state even though they must establish her sanity either on rebuttal or otherwise beyond a reasonable doubt.

When she elected to divulge the course of conduct she followed at the time she committed the murder of her psychiatrist, she forever closed the door with regard to keeping those particulars secret from the state attorney. That being the case, and surely it is, there is absolutely no point in her complaint regarding how she feels she may be harmed if she is made to talk to the state's psychiatrist.

It is almost Hornbook law that neither her psychiatrist nor the state's psychiatrist can divulge anything with regard to her statements to them since it would be hearsay of an easily identifiable nature and would, of course, be impermissible. Apart from that the function of either or both of the medical experts is not to give evidence regarding her criminal complicity (if any) but simply to give their expert opinion with regard to whether she was in sufficient possession of her mental faculties at the time she committed this crime so as to know the difference between right and wrong.

It is an absolute certainty that the state will secure this information whether from her or her psychiatrist. We contend that it matters now not one whit that it comes one way rather than another.

Though petitioner would make much of the fact that the decision of the District Court of Appeal allegedly limiting the scope of the extent to which she might go at her trial with regard to the question of her sanity and that of the Supreme Court of Florida which she contends perhaps did even more harm to her should be reversed by this Court, respondent submits that nothing is further from the truth. All Florida has done is simply exercise a well recognized prerogative in determining just exactly how expert

witnesses must function in Florida's courts if they will be permitted to function at all. See Washington v. U.S., 390 F.2d 444.

The Washington case, supra, is as lucid a piece of judicial writing as your respondent has been privileged to read regarding the matter petitioner urges should become critical with this Court. Without elaborating on what that decision says, respondent observes that psychiatrists may be judicially circumscribed in the manner in which they must function in a court of law when insanity is an issue.

Is there anyone sitting on this or any other court who would honestly suggest that petitioner's psychiatrist could testify regarding petitioner's utterances to him? That would be hearsay to begin with and it would permit petitioner to put before the jury her alleged exculpatory statements (vis-a-vis her insanity) without having to run the risk of cross-examination or a possible charge of perjury. In short, she would like to have her psychiatrist tell it as (?) she would like it to be, secure in the knowledge that she would remain insulated from all of the travails normally following such a situation.

We also observe that the decision in McCullers, supra, would preclude her psychiatrist from testifying if the proffer shows as we suspect it will that his only encounter with regard to her sanity came from her lips and only hers. It is clear that Florida's Supreme Court was

never foolish enough to think that one can send a fox to guard the chickens. What defendant in his right mind would ever take the witness stand if he could have his psychiatrist put before the jury just what it was he wanted them to hear, knowing all the while that he would never lose the closing argument and never have to run the risks of an ordinary witness in an ordinary trial on an ordinary issue.

In truth and fact, Mary Julia Parkin wants to play a game in which there is no chance of losing. She wants either the element of surprise, which she tacitly admitted in oral argument before the Florida Supreme Court, or the ability to put before her jury the delightful prospect of having a highly reputable psychiatrist saying she was insane when she did in her husband and mockingly telling the jury that the State of Florida, with its vast resources, could not even find one doctor to say that she was not. Even assuming that we could find a doctor who was willing to hazard an observation regarding the lack of insanity, one can just imagine what petitioner's counsel would make of him on the stand when he would be forced to admit that he never even discussed the matter with the accused. After all, he would not be permitted to say that she refused to answer his questions or give him a factual breakdown of those events which occurred because to let him do so would be in effect to allow the State of Florida to comment on her failure to give responses to inquiries put to her and so it is that

it is Tweedledum or Tweedledee. Oh, no, if there is a Hobson's choice, it is one left to the State of Florida--assuming, of course, petitioner has her way and makes it impossible for justice to ever see the light of day, at least as to her case.

We again remind this Court that it is an absolute certainty that Florida will come by this information (what she told her psychiatrist) whether we get it from her directly to our psychiatrist or whether we get it from her psychiatrist on the business end of a subpoena. We say again that it ought not to matter that it is properly secured one way or another.

Surely this Court is more than busy enough without having to engage in the requested resolution of simple academic questions no one of which would provide petitioner with relief from the situation in which she must find herself at trial, whichever way one chooses.

CONCLUSION

Respondent respectfully submits that compelling petitioner to communicate orally with the state psychiatrists in no way violates her constitutional rights against self-incrimination as guaranteed by any amendments either to Florida's or the Nation's Constitution. Nor may it

be said that the judicial circumscription imposed against petitioner either deprives her of her right to make an insanity defense or results in a deprivation to her of any due process.' She is in no danger (not of her own independent making) of suggesting irreparable injury by being compelled to comply with the order of the court.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

Counsel for the Respondent.

PROOF OF SERVICE

This is to certify that I have forwarded copies of the foregoing Response to Petition for Writ of Certiorari to petitioner's counsel, the Honorable Albert J. Datz, Datz & Jacobson, 320 First Bank & Trust Building, Jacksonville, Florida 32202, by mail, this _____ day of February, 1971.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel.

In The
Supreme Court of the United States

October Term, 1970

NO. 678

MARY JULIA PARKIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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I.

Throughout Respondent's brief the theme is asserted (Resp. Br. 2, 3, 4, 20) that the insanity defense is something the defendant has *elected* to raise, and having done so the defendant is barred from exercising her right against self incrimination with respect to that issue. This thesis is unsound. It overlooks the fact that the State initiates the prosecution and has the burden of proving every element of guilt, including the element that the defendant had the nec-

essary criminal intent to commit the crime. To carry such theory to a logical conclusion the defendant who *elects* a defense of self defense may be compelled to submit to an interrogation concerning that defense; the defendant who *elects* to rely upon a defense of alibi may be compelled to submit to a pre-trial examination concerning that defense; a defendant who *elects* a defense of entrapment may be compelled to submit to a pre-trial examination concerning entrapment. . . a defendant who *elects* to plead not guilty may be barred from exercising his right against self incrimination.

II.

Respondent also attempts to divert attention from the real issue by suggesting (Resp. Br. 24, 28) that the issue is moot. The reason given by Respondent is that the prosecutor, under Florida procedure, §27.04 Florida Statutes, can subpoena the defendant's psychiatrist to a pretrial inquiry and discover what the defendant has told her psychiatrist (engaged by defendant's attorney for his expert advice). The Respondent makes a positive conclusion:

> "We again remind this Court that it is an absolute certainty that Florida will come by this information (what she told her psychiatrist) whether we get it from her directly to our psychiatrist, or whether we get it from her psychiatrist on the business end of a subpoena." (Resp. Br. 28)

This concept is not involved here because none of the opinions of the Florida courts is based upon it -- it is not even discussed in the opinions. Even so, Respondent's theory is erroneous for several reasons:

(1) No Florida court has ever held that such procedure (pretrial discovery of attorney's work product) is available to the prosecution in a criminal case. To the contrary, in civil cases the theory is disapproved. *Ford Motor Company vs. Cochran*, 205 So.2d 551 Fla. 2nd D.C.A. 1967); *Hartstone Concrete Products vs. Ivancevich*, 200 So. 2d 234 (Fla. 2nd D.C.A. 1967); *Dade County vs. Bosch*, 133 So.2d 570 (Fla. 3rd D.C.A. 1961). Also see, 86 A.L.R. 2nd 138, "Pretrial Depositions -- Discovery of Opinions of Opponent's Expert Witnesses"

(2) If such procedure is available to the prosecution, the fact that the psychiatrist can be deposed does not mean that the defendant can also be deposed, no more than a defendant who has given a statement to the police can be said to be thereafter subject to compulsory pretrial prosecutorial interrogation.

(3) The Respondent presumes the defendant has given to her psychiatrist a detailed statement of all factual matters relative to the alleged crime. This presumption is not necessarily valid.

(4) The defendant cannot be protected from the prosecution's use of information discovered through the psychiatric interrogation to supply evidence of guilt not related to the defense of insanity.

Respectfully submitted,

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